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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 481

VIKING THEATRE CORPORATION, *Petitioner*,

v.

PARAMOUNT FILM DISTRIBUTING CORPORATION, *et al.*,
Respondents.

MEMORANDUM OF PETITIONER VIKING THEATRE CORPORATION IN OPPOSITION TO MOTION OF THEATRE OWNERS OF AMERICA, INC., AND ALLIED STATES ASSOCIATION OF MOTION PICTURE EXHIBITORS FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

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Petitioner files this memorandum in accord with Supreme Court Rule 42(3) setting forth its reasons for refusing consent to the filing of a brief amici by Theatre Owners of America, Inc. (TOA) and Allied States Association of Motion Picture Exhibitors (Allied).

Petitioner is not opposed to the Court considering the brief amici, provided the Court is informed of some of the circumstances, as reported in the industry press, which cause the amici to appear more as friends of the respondents than as friends of the Court.

On the very day on which this Court granted certiorari in this case, "The Boxoffice," a trade publication in the motion picture industry, announced the appointment of Mr. Stuart H. Aarons as chairman of the TOA legal advisory committee to replace Mr. Herman Levy, attorney for the amici curiae in this case. In describing Mr. Aarons' background and qualifications, the article noted that, shortly after graduating from law school, he joined the legal staff of Warner Bros. Pictures, a respondent in this action, and is presently house counsel for Stanley Warner Corp., another respondent in this action. Moreover, as the article failed to point out, Mr. Aarons appeared in the trial of the instant case as counsel for Stanley Warner.

This same edition of "The Boxoffice" also reported the first statements of Mr. Aarons in his new joint capacity as house counsel to Stanley Warner and legal advisor to TOA. Mr. Aarons hailed a recent decision in Boston in which an exhibitor had lost an antitrust case on directed verdict. The article reported:

> Aarons said this case was the latest in a series of decisions where courts in motion picture antitrust cases had thrown out the case without permitting it to go to the jury. He noted that similar rulings were rendered in *the Viking case* in Philadelphia. . . .
>
> It would appear, he said, that the "terror and coercion of civil antitrust cases in the motion picture industry should by now be dissipated," and that "distributors should take heart from this decision." He said they should not be coerced by antitrust suits to "erode the firm structure upon which this industry was built" . . . In conclusion, Aarons said it was high time that discipline and

> order be recreated in distribution and that "this decision points the way to that end."

Mr. Aarons' point of view apparently touched a responsive chord, for the plan to file the brief amici in the case at bar was announced by John H. Rowley, president of TOA, at the closing dinner of the Texas Drive-In convention in Dallas, Texas, on February 14, 1964. Earlier in that same convention, Mr. Aarons, house counsel to Stanley Warner and legal advisor of TOA, once again had a few words to say on the application of the antitrust laws to his industry. His remarks were reported in the "Film Daily," another industry publication, in its February 13, 1964 edition:

> The speaker [Aarons] asserted that "we have become so antitrust-minded that lawyers today are dictating distribution policy and distribution policy affects every theatre owner in the land.
>
> Aarons told the convention that "every fair-minded man today will now admit that divorcement [*United States* v. *Paramount*, 334 U.S. 131] has caused our industry infinitely more harm than good."
>
> He charged that "in our industry many seek to invoke the antitrust laws on problems which basically have no relation to Sherman or Clayton Act violations."

In view of the announcement shortly thereafter of TOA's plans to file the present brief, petitioner cannot help concluding that Mr. Aarons had the *Viking* case in mind in making the final statement quoted above.

Besides the militant activities of Mr. Aarons, there are other ties between TOA and the respondent-ex-

hibitors. Counsel for the amici curiae has informed petitioner that four employees of Stanley Warner and two employees of National Theatres Inc. (owner of Fox Philadelphia) are among the 133 TOA officers, directors, and executive committee members. The "1963 Film Daily Year Book" shows Simon Fabian, president of Stanley Warner, as treasurer of TOA, and his son as assistant to the TOA president, although petitioner is informed they have now been replaced.

With respect to the contents of the brief amici, the petitioner first takes issue with the statement:

> "All of the years of disunity between these two associations, and all of the years of non-cooperation for common objectives, well known to Government agencies, have been put aside, in order that this Court may know that those for whom the decision in this case has the most significant meaning, are as one in an attempt to assist this Court." Amici Brief, p. 6.

Petitioner finds itself unable to reconcile this statement with current reports in the industry press that the two organizations are so close that they are considering merger. Under the headline "TOA-Allied Boards Will Decide Merger," the publication "Film Daily," January 7, 1964, reported a "summit meeting" of representatives of the two organizations in Miami Beach, Florida, to discuss the possibility of merger and to make reports to their respective organizations. This blossoming affinity is corroborated in "Allied Report," March, 1964, (a publication of the amicus Allied) which states:

> Allied and TOA scheduled a meeting in Kansas City on March 3rd to continue discussions on effecting closer cooperation and coordination be-

tween the two organizations and to explore the possibilities of a single national exhibitor organization.

According to the March 11, 1964, edition of "Motion Picture Exhibitor," the Kansas City meeting resulted in the appointment of a joint committee to study merger plans and the formulation of joint plans to attack the new distribution practice of blind bidding.

The most significant point, however, is not what the brief amici says, but what it fails to say. While asserting that the "split" is a cardinal principal of the industry, it fails to supply a factual analysis of the industry to support it. Either the prevalence of this trade restraint has been exaggerated out of all proportion, or the participants in these splits are unwilling to admit and document its existence lest too much light be cast on the manner and consequences of its operation.

Petitioner contends that a true analysis of the industry would show that the split is more abused than used. For while the amici argue that the split "mitigates the power of the 'longest purse,' and thereby helps the distributor keep the exhibitors, who are his outlets, in business", Amici Brief, p. 10, the record in this case shows that in Philadelphia only the "longest purses" are given the benefit of the trade restraint while the independent and marginal exhibitors are excluded and discriminated against.

It is petitioner's belief that the brief amici is one more demonstration of the influence of the "longest purses" in the exhibition industry in perpetuating advantageous trade restraints through industry associations. *Cf., Eastern States Retail Lumber Dealers Ass'n* v. *United States*, 234 U.S. 600 (1914).

For the foregoing reasons, the petitioner has been unwilling to grant its consent to the filing of the brief amici.

Respectfully submitted,

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March, 1964.